JD–182–97
New Ulm, MN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

OAK HILLS LIVING CENTER,
HIGHLAND MANOR, INC.

and

TEAMSTERS LOCAL NO. 544, affiliated with
THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO

Cases 18–CA–14320
18–CA–14340–1
18–CA–14340–2
18–CA–14433

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for the General Counsel.
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*(Carol Berg O'Toole & Associates, P.A.),*
of Minneapolis, Minnesota, for the Respondent.
*Martin J. Costello, Esq., (Hughes & Costello),*
of St. Paul, Minnesota, for the Union.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Minneapolis, Minnesota on August 13 and 14, 1997. The charge in case 18-CA-14320 was filed on January 3, 1997; the charges in Cases 18-CA-14340-1 and 18--CA--14340-2 were filed on January 21, 1997; the charge in Case 18-CA-14433 was filed on April 2, 1997; amended charges in the latter cases were filed on April 10 and May 21, 1997, respectively. The complaint was issued May 21, 1997. The complaint alleges that Oak Hills Living Center, Highland Manor, Inc. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating and threatening employees and violated Section 8(a)(5) of the Act by making midterm modifications of the contractual conditions without first complying with the notice requirements of Section 8(d) and by refusing to meet and discuss grievances unless Teamsters Local No. 544, affiliated with the International Brotherhood of Teamsters, AFL-CIO (the Union) first agreed to withdraw charges that it had filed with the National Labor Relations Board (the Board). Respondent filed a timely answer that admitted the jurisdictional allegations, the labor organization allegation, and the agency allegations of the complaint; it denied the remaining allegations and pled a number of affirmative defenses. At the hearing, the Respondent admitted the filing and services of the charges, the appropriateness of the bargaining unit, the recognition of the Union and its 9(a) status.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

## Findings of Fact

### I. Jurisdiction

Respondent, a corporation, operates a nursing home and assisted living units at its facility in New Ulm, Minnesota, where it annually derives gross revenues in excess of $100,000 and receives goods and services valued in excess of $5000 directly from points outside the State of Minnesota. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. Alleged Unfair Labor Practices

#### *A. Background*

Respondent operates a 94-bed skilled nursing home and 16 assisted living apartment units. Since 1990, when it was certified by the Board, the Union has represented certain nonprofessional employees at the facility. In 1996, pursuant to a unit clarification petition, the unit was clarified to add personal care attendants who worked in the assisted living aspect of Respondent's operations. The Union and the Respondent have negotiated a series of collective-bargaining agreements, the most recent of which ran from July 1, 1994, to June 30, 1997.

#### *B. The 8(a)(5) Allegations*

The complaint alleges that the Respondent failed to give employees a contractually required wage increase, ceased making certain contributions to employees' 410(k) plan, and changed employees' health and welfare benefits without first giving the Union the 90-day notice, and the Federal Mediation and Conciliation Service (FMCS) and the Bureau of Mediation Services for the State of Minnesota the 60-day notice, as required by Section 8(d) of the Act.[1]

There is no dispute that effective January 1, 1997, Respondent made certain changes in terms and conditions of employment of unit employees covered by the collective-bargaining agreement then in effect. In making these changes, Respondent relies upon article 29 of that agreement, entitled "Rule 50 Approval" that provides: "The Employer's income is dependent on a cost reimbursement rate, as from time to time established by the Minnesota Department of Human Services. During the term of this Agreement, if the reimbursement rate is reduced, the parties agree to meet and negotiate a possible reduction in the wages and benefits provided for in this Agreement."

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[1] Sec. 8(d) requires, in pertinent part, that where there is a collective-bargaining agreement in effect, no party to the contract shall terminate or modify the contract unless the party seeking to make the changes (1) gives written notice to the other party of the proposed termination or modification 60 days (90 days if the employer is a health care institution) prior to the expiration of the contract; (2) offers to meet and confer with the other party over the proposed changes; (3) notifies FMCS within 30 days (60 days if the employer is a health care institution) after the notice to the other side of the existence of the dispute and simultaneously notifies any state agency established for the purpose of mediating or conciliating disputes within the state; and (4) continues in full force and effect, without resorting to strike or lockout, all terms and conditions of the existing contract for a period of 60 days (90 days if the employer is a health care institution) after such notice is given or until the contract expires, whichever occurs later.

In early 1996, Respondent invoked article 29 and met with the Union for the purpose of negotiating reduced monetary benefits for unit employees. The Union agreed to present the reduction propopals to employees for their acceptance or rejection. The employees voted to reject all the proposed reductions, and Respondent was notified of this by letter dated July 9, 1996. Respondent did not implement those reductions.

On December 3, 1996, while the parties were meeting to negotiate the contractual terms for the assisted living employees that had been added into the unit, Carol Berg O'Toole, who represented Respondent, handed the Union a hand-written note, dated December 3, 1996, which read:

> We are notifying you today that we wish to meet & negotiate regarding Article 29 of the labor agreement. The employer has experienced a reduction vis a vis Rule 50. We would like to discuss a possible reduction in wages & benefits. We are available on the following dates Dec 10 --AM (10-12:00) Dec 19 --AM or PM Dec 23 AM or PM."

The note was signed by O'Toole and indicated that a copy was sent to Frederick Brumm, administrator. There was some limited discussion of reduction proposals by the parties at this meeting. However, no agreement was reached and the Union was unable to meet on any of the dates suggested by O'Toole.

On December 5, 1996, O'Toole sent the Union a written letter similar to the hand-written note she had given earlier. In addition, the letter stated:

> It appears that we will have great difficulty meeting the January payrolls, let alone implementing the scheduled wage increase, January 1, 1997. Among the topics we would like to discuss are the following: a wage freeze; the 401K employer contribution; deductibles for health and hospitalization; unlimited accumulation and payout of unused sick leave. We need to effect some of these economies very expeditiously and need to know what your views and preferences are."

The letter indicated that if the Union was unable to meet on the dates suggested, it should suggest other dates because Respondent would like to meet before January 1, 1997. The Union responded by letter dated December 9, 1996. After reciting some of the history of this matter, the Union indicated that it would be available to meet with Respondent on three specified dates in late January 1997 at the soonest.

On December 16, 1996, O'Toole sent the Union a letter which also recited the developing history on the matter. It added:

> This letter is to inform you that the time has come for Oak Hills Living Center to act on the proposals that were presented to you at our December 3, 1996, negotiations session regarding the Care Attendants. Effective January 1, 1997, the following will be implemented: 1. The current wage schedule will be maintained. The scheduled January increase will not be given. 2. The

> discretionary five percent 401k match contribution will be eliminated. 3. The present health insurance will change to a Health Maintenance Organization with the present carrier, Blue Cross Blue Shield.

O'Toole invited the Union to meet and discuss the changes before implementation.

On December 31, 1996, O'Toole sent a letter and a fax copy of the letter to the FMCS which advised that agency of Respondent's intent to implement certain changes in working conditions on January 1, 1997.

The contract then in effect dealt with each of the benefits that were to be changed. Concerning the wage increase, article 22, exhibit F specifies wage increases effective January 1, 1997, for unit employees on a job classification basis. Concerning the health insurance, article 14, entitled "Hospitalization Insurance" specified "The Employer shall make hospitalization insurance available to the regular full-time and regular part-time employees . . . and shall pay seventy-five percent (75%) of the single coverage premium." Under the plan then in effect, employees paid a yearly deductible of $100 for single coverage. Concerning the 401(k) plan, article 28, entitled "401K Retirement Plan" provides "The Employer shall make available to all employees, as required by the Plan, a 401K retirement plan whwereby employees may defer wages as a tax shelter savings plan. The Employer may also match the employee contributions up to a certain percentage, as defined by the Plan." Respondent's practice, since about 1989, was to match 100 percent of the employee's first 5 percent contribution to the plan.

On January 1, 1997, Respondent implemented the changes described in its December 16 letter to the Union.[2] As a result of the changes, employees did not receive the scheduled wage increase and Respondent stopped making its 5 percent matching contribution to the 401(k) plan. Also, as a result of the change in health insurance carriers, the yearly deductible for single coverage increased to $500 per year although overall costs of the insurance to employees was reduced by approximately 18 percent per year. At no time prior to the implementation did Respondent send any notice to the Bureau of Mediation Services for the State of Minnesota. After January 1, 1997, the parties met on several occassions to attempt to resolve the matter, but they were unsuccessful.

In summary, the facts show that Respondent invoked the reopener provision in the contract on December 3, 1996, it did not give notice to the FMCS until December 31, 1997, and never sent notification to the Bureau of Mediation Services for the State of Minnesota. Respondent implemented certain changes on or shortly after January 1, 1997. The wage increase was explicity set forth in the contract, and I conclude that the changes in the longstanding terms and conditions of employment regarding the health insurance and 401(k) plans were sufficiently related to specific contractual provisions so as to constitute "terms and conditions" of an existing contract within the meaning of Section 8(d). Respondent did not comply with the requirements of either Section 8(d)(3) or (4).

[2] Technically, the employees did not receive a paycheck without the pay increase until January 14, 1997; the new health insurance benefits did not become operative until February 1, 1997, and Respondent's matching contributions for the 401(k) plan were not due until February 1997. However, the Union was not advised of these time lags in the effect of the implementation on unit employees.

The General Counsel argues that by this conduct Respondent violated Section 8(a)(5) of the Act, relying primarily on *Speedtrack, Inc.,* 293 NLRB 1054 (1989). In that case, the Board discussed the obligations under Section 8(d) of the parties to a contract invoking midterm modication provisions. There the Board, relying in part on *NLRB v. Lion Oil Co.,* 352 U.S. 282 (1957), concluded that an employer seeking to make midterm modifications to a contract pursuant to a contract reopener provision must first comply with the notice requirements in Section 8(d). Respondent, on the other hand, argues that the provisions of Section 8(d) do not apply to midterm renegotiations. It relies primarily on *NLRB v. Graphics Communications Union Local 554 (World Color Press),* 991 F.2d 1302 (7th Cir. 1993), enfg. 306 NLRB 844 (1992). There the court enforced a Board order requiring a union to sign a contract that it had agreed to pursuant to voluntary renegotiations during the term of a contract. The court affirmed the Board's holding that the notice provisions of Section 8(d) did not apply in that case.

I agree with the General Counsel that *World Press,* supra, is distinguishable. That case involves a situation were the parties voluntarily agreed to midterm modifications of a contract and the Board held the parties to their agreement; no such event happened in this case. To the contrary, I have found that midterm modifications were implemented without the agreement of the Union. Instead, Respondent relied upon the wage reopener provisions of the contract. Under these circumstances Board law is clear that Respondent was required to adhere to the requirements of Section 8(d). *Speedtrack,* supra. By its admitted failure to do so, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act.

Respondent argues that financial necessity excused its conduct. However, Respondent has not met its burden in that regard. *Compact Video Services,* 319 NLRB 131 (1995). enfd. 121 F.3d 478 (9th Cir. 1997). Indeed, Respondent in its brief admits that it had been aware of a developing financial crisis for a year. The delay in notifying the FMCS was largely Respondent's own making; it cannot cause its own time crisis and then complain it has no time to comply with the law.

The complaint also alleges that Respondent refused to meet or discuss grievances at step 4 of the negotiated grievance procedure unless the Union first withdrew charges it filed with the Board. Step 4 provides in pertinent part:

> Either party may submit the grievance for final resolution to an arbitration panel, whose decision shall be final and binding on all parties. The arbitration panel shall consist of two (2) representatives appointed by the Union and two (2) representatives appointed by the Employer. In the event the arbitration panel cannot make a decision relative to the grievance, then, and in that event, they shall select a neutral arbitrator and the majority decision of the five arbitrators shall be final and binding on all parties.

On March 20, 1997, the Union sent a letter to Respondent requesting that three named employees be granted time off to attend a step 4 grievance meeting set for April 2. Permission was not granted, and the Union filed an unfair labor charge with the Board over the denial of permission.

On April 2, 1997, there was a meeting at Respondent's facility to discuss a number of pending grievances that were at step 4 of the grievance procedure. Present for the Union were Dan Girard; Dennis Krahmer, business agent; Brad Slawson, union vice president; and Collette Thorson, union steward. Present for Respondent were Bill Bednarczyk, negotiator; Frederick Brumm, administrator; Cindy Williams, office manager; and Carol Berg O'Toole, attorney. After introductions, Slawson said that the meeting was to be the fourth step of the grievance procedure to discuss certain specified grievances and that he had sent a letter to Respondent requesting that the grievants and union stewards be present at the meeting. O'Toole, who passed out copies of the charge that the Union had filed, replied that only Bednarczyk, Williams, Krahmer, and Girard were to be present for the meeting and that she originally was not going to be present but Brumm had called her and told her of the charge that the Union had filed over the failure to permit the grievants and stewards to attend the meeting. O'Toole said that there was not going to be a grievance meeting held that day because of the charge. Slawson argued in favor of the right to have the grievants and stewards present at the meeting. O'Toole replied, "Well drop the charges and we will continue on." Slawson replied that he could not withdraw the charge. O'Toole then said that there would not be any grievance meetings until the charges were settled, and that by that time she was sure the Union would have filed more charges. Slawson protested that O'Toole was acting unlawfully; he asked if she was refusing to hear the grievances. O'Toole said, "Yes." Slawson said that this left the Union no choice but to file more charges. O'Toole said, "What's a Tuesday without filing more charges." Slawson then attempted to convince Brumm that O'Toole was wrong to cancel the meeting, but Brumm did not respond and the management representaives left the room. Slawson told the union representatives that they should write down what had just happened, however, O'Toole returned to the room and told them to leave and turned out the light.

When Thorson, who was not scheduled to work that day, returned home shortly thereafter she prepared a written account of what had occurred at the meeting. Thorson worked for Respondent as a cook for 18 years; she had been a union steward for about 6 years. Prior to April 2, she had never attended a step 4 grievance meeting, and no grievances had ever been arbitrated before this time because all prior grievances had been settled.[3]

[3] These facts are based on Thorson's testimony and written summary of the meeting prepared by her which was received into evidence without objection. I note that Thorson is a long-term employee who continued to be employed by Respondent at the time of the trial and that her testimony was corroborated in substantial part by Krahmer and Slawson. I have considered the testimony of Williams, but I conclude it is not fully reliable. For example, on direct examination Williams testified that at this meeting, the union representatives made statements concerning the licences of Brumm and O'Toole. However, on cross-examination, Williams stated that she was unable to recall whether those comments were made at the April 2 meeting or at an earlier meeting, and she admitted that those comments were not included in the version of the April 2 meeting contained in the affidavit she gave to the Board less than 2 weeks after the meeting. I conclude that Williams was either unsure of exactly what occurred on April 2 or she was attempting to buttress Respondent's case with her testimony at the trial. For these reasons, as well as my observation of the demeanor of the witnesses, I do not credit the testimony of Williams concerning the April 2 meeting. I also do not credit the testimony of

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Additional meetings that had been scheduled to discuss grievances at the step 4 level were also canceled by O'Toole, who told Slawson that the meetings could not go forward until the charges were resolved.[4]

The General Counsel argues that Respondent violated Section 8(a)(5) by insisting that the Union withdraw the charge it had filed as a condition before holding the step 4 grievance meeting, citing *Zenith Radio Corp.,*187 NLRB 785 (1971), and *Martin Marietta Energy Systems,* 316 NLRB 868 (1995), and distinguishing *Cherry Hill Textiles,* 309 NLRB 268 (1992). Respondent, in its brief, argues only that the testimony of its witnesses should be credited. It does not cite case authority to support an argument that if its witnesses are credited, its conduct at the April 2 was lawful,[5] nor does it cite case authority to challenge the General Counsel's argument that if his witnesses are credited then Respondent violated the Act.

As a general rule, an employer may not refuse to bargain with a union because the union has filed an unfair labor practice charge. *Zenith Radio,* supra. However, in certain circumstances the Board has found that an employer was excused from discussing grievances because they were subject of a charge pending before the Board. *Airport Aviation Services,* 292 NLRB 823, 830 (1989); *Cherry Hill Textiles,* supra. The test is whether the employer's conduct obstructed the overall functioning of the grievance procedure. *Martin Marrietta,* supra; *Airport Aviation,* supra. I have concluded above that on April 2, 1997, Respondent refused to process the grievances at step 4 of the grievance procedure unless the Union withdrew its charge, and it thereafter canceled additional meetings set to discuss grievances at step 4. At no time has Respondent yet agreed to resume processing grievances at that step of the grievance procedure. Thus, grievances are effectively blocked from being processed to arbitration by virtue of Respondent's conduct. I conclude that this constitutes a significant obstruction of the grievance procedure which cannot be justified by the fact that the Union filed a charge. I note that Respondent was not required to withdraw its position concerning which individuals may properly attend a step 4 meeting, but it may not condition the processing of grievances, which is a significant aspect of its bargaining obligation, on the Union's withdrawal of the charge that it had filed. I, therefore, conclude that Respondent violated Section 8(a)(5) and (1) of the Act when it insisted that the Union withdraw the charge the Union had filed before Respondent would agree to discuss greivances at step 4 of the grievance procedure.

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O'Toole concerning this meeting. In addition to my observation of the demeanor of the witness, it seems this testimony was, at times, more designed to suit Respondent's legal position than a purely factual recitation of events. Finally, I note that Brumm was present at the meeting and testified at the hearing, but he did not testify concerning the events.

[4] This testimony was not rebutted by O'Toole. The General Counsel stated at the hearing that he was not seeking a finding of an unfair labor practice for any refusal to process grievances other than on April 2; accordingly, I make no finding on that issue. This evidence, however, may be considered for credibilty purposes and to shed light on the nature of the conduct alleged to be an unfair labor practice.

[5] Because of my credibility resolution of this matter, I find it unnecessary to decide whether the facts according to Respondent's witnesses would nonetheless have violated the Act.

*C. The 8(a)(1) Allegations*

The complaint alleges that Respondent interrogated an applicant for employment about the applicant's union sympathies. In late November or early December 1996, Tracey Ness was interviewed for employment by Respondent. At that time Ness was employed elsewhere and was seeking full-time employment with Respondent as a registered nursing assistant. Ness's mother worked for Respondent as a licensed practical nurse. Ness was interviewed at Respondent's facility by Connie Elfert, who was then Respondent's director of nursing. Elfert asked Ness various questions about Ness' work background, education, and current employment. She also asked how Ness would feel working under the direction of her mother. The interview was interrupted by Frederick Brumm, administrator, and Elfert left the office for approximately 15 minutes. When Elfert returned, she continued the interview. At some point Elfert asked Ness what Ness thought about the Union, and Ness replied, "I don't know. I never worked with one." Elfert asked if Ness's employer was union, and Ness relied that it was not. Elfert then asked if Ness's mother ever came home and told her anything about the Union. Ness responded that her mother was sick of being pulled back and forth and wondering if she was going to have a job the next day. Towards the end of the interview, Elfert said that if Ness worked for Respondent for 30 days she would have the chance of joining the Union, and Elfert then explained about wage increases.[6]

The General Counsel argues that Elfert interrogated Ness in violation of Section 8(a)(1), citing *American Signcrafters,* 319 NLRB 649, 651 (1995). Respondent argues that Elfert's testimony shows that she did not unlawfully interrogate Ness, citing *Industrial Waste Service,* 269 NLRB 1176 (1984), and *Ellis Toyota,* 266 NLRB 442 (1983).

In resolving this issue I am guided by the Board's instruction in *Rossmore House,* 269 NLRB 1176 (1984), to evaluate the totality of circumstances in assessing whether an interrogation reasonably tends to restrain, coerce, or interfere with employees' Section 7 rights. In assessing the totality of circumstances, I note that Elfert's questioning of Ness was unaccompanied by threats or promises. On the other hand, there is no evidence that Ness was an open union adherent; to the contrary it appears that her union sentiments were in their formative stage. The interrogation took place in the Elfert's office, was made by Elfert who had the authority to decide if Ness would be hired or not, and were made in the course of the very employment interview when Elfert was certainly assessing whether to hire Ness. In addition, as described above, Elfert first asked Ness what she thought about the Union. When Ness gave a noncommittal response, Elfert asked about the union status of Ness' employer. While this latter questioning, standing alone would certainly be insufficient to establish a violation under these circumstances, it would serve to heighten Ness' perception of the importance of this matter to

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[6] These facts are based on the testimony of Ness, who I conclude is a credible witness. I have considered Elfert's testimony that she did not interrogate Ness concerning union activities or membership, as well as the notes Elfert made of the interview of Ness. Elfert's testimony was not persuasive. For example, Elfert testified that she was especially careful in interviewing applicants to not inquire into union-related areas because a charge had been filed accusing her of just such conduct. However, on cross-examination, Elfert admitted that the charge was not filed until after she interviewed Ness. Thus, it could not have served to heighten the care she took in interviewing Ness. Based on the nature of Elfert's testimony, as well as my observation of her demeanor as a witness, I do not credit her testimony. I also do not consider the notes of the interview to be particularly persuasive since it is apparent that the notes do not reflect the entire content of the interview.

Elfert. Then Elfert proceeded to intrusively probe into the union activity and sympathy of Ness' mother while at home with Ness. These persistent interrogations, under the circumstances described herein, convince me that under all the circumstances, Elfert's interrogation of Ness reasonably tended to interfere with, restrain, or coerce Ness in the exercise of her Section 7 right to support the Union if she so chose. I conclude that by interrogating Ness concerning her union sympathies and the union sympathies of others, Respondent violated Section 8(a)(1) of the Act.

In arguing that this allegation should be dismissed, Respondent states in its brief, "The result should be the same as [*Ellis Toyota,* supra], where no violation was found." This is puzzling because in that case the judge found that the employer had, in fact, unlawfully interrogated employees and the Board affirmed this finding. Indeed, then Chairman Miller expressly dissented on this point. I cull nothing from this case that supports Respondent's argument.

The complaint also alleges that Respondent threatened registered nurses that if they did not cross a picket line, they could be terminated. By way of background necessary to understand the context of this allegation, the Union sent Respondent two written strike notices. The first indicated that a strike would occur on January 13, 1997; the second notice rescinded the first one and indicated that a strike would occur on January 16. However, no strike actually took place. Nonetheless, Respondent, in anticipation of the strike, notified the Union that it intended to poll unit employees, in accordance with law, to determine whether unit employees intended to appear for work. There is no contention by the General Counsel that Respondent's conduct regarding unit employees was unlawful. Respondent, however, treated nonunit employees differently from unit employees in that it told nonunit employees that they were expected to appear for work as scheduled; it did not use the same legal safeguards in communicating with nonunit employees concerning their intention to honor the picket line as it used with unit employees, and it told nonunit employees that normal procedures would be applied if they honored a picket line, something that Respondent carefully avoided saying to unit employees.

In support of this allegation of the complaint the General Counsel relies on Respondent's own version of the events in question. Specifically, he relies on a statement of position, dated February 27, 1997, signed by Carol Berg O'Toole, and submitted during the investigation of the charge filed by the Union concerning this allegation.[7] In that statement of position O'Toole states:

> The meeting in question was actually one of two small group meetings held on January 7, 1997. Both bargaining unit and non-bargaining unit individuals were present, including registered nurses who are not in the bargaining unit. The meetings were held 10:30 A.M. and 3:30 P.M.
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> The meeting opened with Brumm stating that the bargaining unit members had a right to strike, as there was the absence of a "No Strike" clause in the contract and that Oak Hills had the right to continue to operate to provide health care services to its residents.

[7] This statement is an admission by a party-opponent within the meaning of Rule 801(d)(2), Federal Rules of Evidence, and thus is not hearsay.

> During the meeting a question was asked related to registered nurses (RNs) and what would happen if a strike occurred. The individual who asked the question was not a member of the bargaining unit. Her name is Ana Miller, a registered nurse. Brumm told her that the registered nurses were expected to be at work for their normally scheduled shifts.
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> Barb Smith, a member of the bargaining unit and a licensed practical nurse (LPN), followed up Miller's question by asking if registered nurses would be fired if they refused to cross the picket line. Brumm responded by stating that normal personnel policies would apply as they relate to unexcused absences/no shows.
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> Oak Hill uses the same policy for everyone; that is, what the Labor Agreement says about unexcused absences/no shows. In Article 20 of the Labor Agreement it states, "Employees shall shall be considered separated from employment with the Employer based upon the following actions . . . . Absence for three (3) consecutive work days without notification to the Employer during such period, unless the employee has a satisfactory explanation for not having furnished such notification to the Employer.

When asked how the unexcused absence policy applied to a situation where an employee honored a picket line and did not call in for 3 days, Elfert, former director of nursing, stated, "We would need to look at it individually." Several witnesses were called by Respondent and gave testimony concerning these meetings; their testimony is generally consistent with the factual recitation given above.

The General Counsel argues that nonunit employees have the right to honor a picket line and join a strike in support of unit employees, citing *Mt. Carmel Hospital,* 255 NLRB 833, 834 (1981), and that, therefore, it is unlawful to threaten nonunit employees with discharge if they refuse to cross a picket lins, citing *Fluor Daniel,* 311 NLRB 498, 501 (1993). Respondent points out that it was very careful to respect the rights of unit employees to engage in a strike if they desired, and it cites "*ACP Industries, Inc. Amcar Div.,* CA 8 (1981), *sub nom ACF Industries , Inc. Amcar Div. v. NLRB, den enf.,* 103: 1303, 106 LRRM 2518 "(sic).

It is well settled, as the General Counsel points out, that nonunit employees may strike in sympathy of unit employees and that an employer may not threaten employees with discipline if they engage in such conduct. I examine the facts to determine whether Respondent's conduct comported with these standards. As admitted by Respondent in its statement of position, Brumm told registered nurses that they were expected to be at work in the event of a strike, and that if they refused to cross the picket line, Respondent's normal policy governing absences would apply. That policy provided that an employee could be fired if the employee failed to appear for work without notification for 3 consecutive days and did not have a satisfactory explanation for the failure to notify Respondent. It is unlawful for an employer to treat an employee's honoring of a picket line as an unexcused absence subject to discipline. *ACF Industries, Inc.* 247 NLRB 1056 (1980); enf. denied 641 F. 2d 561 (8th Cir.

1981). Brumm did not state whether Respondent considered engaging in a sympathy strike to be a satisfactory explanation of an employee's failure to notify Respondent of their absence, thus leaving open the possibility that employees could be fired. Indeed, as late as the hearing Respondent, through the testimony of Elfert, took the position that Respondent would consider employee absences without notification due to honoring a picket line on a case-by-case basis, thereby again leaving open the possibility of discipline. In light of Brumm's earlier comment that employees were expected to appear for work as scheduled, the inference was clear that Respondent would consider discipline if a registered nurse joined the picket line. Where this not the case, Brumm could have directly stated that Respondent recognized that the registered nurses had the right to join the strike if they so desired; he did not do so. Instead, his insistence that employees appear at work as scheduled despite the picket line, combined with his thinly veiled reference to lurking disciplinary possibilities, amounted to threats to those employees that they could be discharged if they failed to cross the picket line. I conclude that by this conduct Respondent violated Section 8(a)(1) of the Act.

The ACF case cited by Respondent is clearly inapposite. There the court found that there had been a waiver of the right to engage in a sympathy strike; there is no such evidence in this case. Putting aside the waiver issue, which is not raised in this case, as I have noted above the underlying Board decision supports my finding here. Respondent also argues that several witnesses testified that they did not, in fact, feel threatened by Brumm's comments. However, this is not the test; the standard is an objective one based on the reasonable likelihood that Brumm's comments would tend to interfere with, restain, or coerce employees in the exercise of their rights. I conclude that Brumm's comments would do so.

The complaint also alleges that Respondent interrogated an employee about the employee's intent to cross a picket line, repeatedly threatened that the employee would be discharged if the employee honored the picket line, and threatened that Respondent would shut down and the employee would lose her job if there was a strike.

Pam Karels was hired by Respondent for the position of registered nursing assistant; she began her employment in December 1996 and worked until the end of February 1997. Karels was also a student during this time period. On January 16, 1997, Karels received a telephone call from Elfert. Elfert asked that if there was strike, would Karels cross the picket line and be coming to work on Friday. Karels said that she would not be crossing the picket line and would not be coming to work if there was a strike. Elfert replied Karels could lose her job; that after 3 days Karels would be fired for not showing up. Elfert said that Karels was not in the Union, and that she should show up for work because the residents of the nursing home needed her. Karels replied that she would talk to her parents for advise and that she would get back to Elfert.

Karels then discussed the matter with her parents. She also told Brad Slawson, union representative, that Elfert had told her that she could be fired if she did not cross the picket line. Slawson assured Karels that she could not be fired for that reason. Karels then called Elfert and told Elfert that she still would not be crossing the picket line and that she did not think that she could be fired for that. Karels explained that she had talked to the Union about the matter and had been assured that she could not be fired. Elfert said, "Well, of course, they are going to say that. They are the union." Elfert also said that Karels could be fired after 3 days of not showing up for work. Elfert continuing, saying that if Karels did not show up for work and if they did not have employees to care for the residents, then they would have to move the residents to another nursing home to get care, the nursing home would have to close down, they would not have any money coming in, and the employees would end up losing their jobs. Karels said, "I would find another job," and Elfert finished by saying, "I guess that's how you stand on it."

Later that day Karels called back to the facility but Elfert was busy so Karels spoke with Deborah Matzke, assistant director of nursing, staff development coordiantor. Karels said that she was not going to cross the picket line, but that she was not quitting her job. Matzke said that Karels could be fired if she did not come in for work; Karels said that she did not think that they could fire her for that.[8]

The General Counsel argues that Karels' testimony establishes that Respondent violated Section 8(a)(1) by interrogating Karels concerning her intent to cross the picket line, citing *Preterm, Inc.,* 240 NLRB 654 (1979), by threatening Karels with discharge if she honored the picket line, citing *Fluor Daniel,* supra, and by threatening that Respondent would close in the event of a strike and employees would lose their jobs, citing *Harper Collins Publishers, Inc.,* 317 NLRB 168, 181 (1995). Respondent argues that according to Elfert's testimony no violations occurred, citing *Bay Area-Los Angeles Express,* 275 NLRB 1063 (1985).

I have found above that Elfert and Matzke told Karels that if she joined the picket line and did not appear for work for three days, she would be fired. Such remarks clearly violate Section 8(a)(1) of the Act, and I so find. *Fluor Daniel,* supra.

I have also found that Elfert told Karels that if the employees joined the strike and Respondent did not have employees to care for the residents, Respondent would have to move the residents to another facility in order to get care, the nursing home would have to shut down, that under those circumstances Respondent would not be receiving money and, thus, would be unable to pay the employees, who would then lose their jobs. In assessing whether this statement constituted an unlawful threat, I am guided by instructions of the Supreme Court in *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969). There the Court stated that an employer was free to tell employees its views of unionism and the consequences of unionization so long as this is carefully phrased on objective fact to show demonstrably probable consequences beyond the employer's control. Id. at 618. Elfert's remarks fail to meet these standards. For example, Respondent has failed to show, based on objective facts, why Respondent would necessarily be unable to operate its facilty during a strike. Experience shows that employers, including health care facilities, are ofter able to operate during a strike and Respondent has failed to show, through objective fact, why it would be unique in this regard. Under those circumstances it would not necessarily follow that Respondent would be deprived of revenues

[8] These facts are based on the Karels' testimony which was internally consistent and probable based on the record as a whole. This, as well as my observation of the demeanor of the witnesses, leads me to conclude that Karels is a credible witness. I have considered the testimony of Elfert and I again conclude that it is not credible. I also consider Elfert's written version of her conversations with Karels, however, I conclude that the written version was prepared well after the events occurred. I base this on the fact that unlike her notes concerning the interview of Ness, the written version is in sentence and paragraph form. It also refers to two separate conversations between which Elfert apparently spoke to other employees, yet there is no reference to those conversations. Finally, Elfert admitted that she spoke to several employees on the same subject she raised with Karels, yet there is no evidence in the record of any notes of those conversations. Having been prepared well after the events, I regard the statement more of a recitation of a position that a simaltaneous reporting of facts. I have also considered the testimony of Matzke. I note that Matzke admits that on two occassions she advised Karels that Karels was expected to report to work in the of a strike. However, I do not believe Matzke's testimony concerning her response to Karels' question of what would happen if Karels honored the picket line.

and be forced to close. Nor, for example, has Respondent shown based on objective fact why, even if it were required to send its residents elsewhere during a strike, it would be unable to resume operations after the strike ended. Employers are often able to resume operations after having been shut down due to the effects of a strike. Under such circumstances, striking employees do not necessarily lose their jobs. Since Elfert's remarks were not carefully phrased to convey consequences based on objective fact of demonstrably probable consequences beyond Respondent's control, I conclude they constituted a threat to close the facility and threats of discharge in the event of a strike and thus violated Section 8(a)(1) of the Act. *Bay Area-Los Angeles Express,* supra, cited by Respondent is not dispositive. In the case the judge dismissed an allegation that the employer violated the Act by saying that it could go bankrupt. However, the judge first noted that this allegation had neither been pled nor fully litigated, and the Board itself did not specifically address the matter. In any event, that allegation concerned facts different from facts recited above in this case..

I have also found above that Elfert called Karels and asked her whether she intended to cross the picket line and come to work. In determining whether this questioning violated the Act, I note that an employer may lawfully question its employees concerning their intent to work during a strike so long as the employer adheres to the certain standards designed to lessen the coercive effect of its intrusion into the union sympathies of the employees. *Preterm,* supra. While Respondent was careful to observe those standards concerning its questioning of unit employees, it failed to do so in the case of Karels, a nonunit employee. I note that this questioning occurred in the context of the unlawful threats described above. Under these circumstances I conclude that Respondent violated Section 8(a)(1) of the Act by interrogating Karels concerning her union sympathy and activity.

*D. Respondent's Defenses*

In its answer Respondent asserted that any "damages" sustained by the Union were caused by the improper conduct of staff in the Board's regional office in the handling of the charges in this case. I did not permit Respondent to adduce evidence to prove this assertion; however, I did permit Respondent to make an offer of proof to preserve its argument. I have again considered the offer of proof, which consists of conclusory assertions of alleged shortcomings by the regional office staff in handling the investigation of these charges, and I conclude that they do not constitute a defense to the allegations of the complaint. Respondent has not established how it was prejudiced by these alleged shortcomings in the presentation of its case at trial. It is at trial after all, and not during the investigation, where the merits of the allegations against Respondent are litigated, and Respondent does not assert that it was denied due process at the trial. I find this defense to be without merit.

Respondent also asserts in its answer that the Union has failed to mitigate damages by refusing to bargain in good faith. However, as a matter of law this argument is irrelevant to Respondent's failure to provide notices as required by Section 8(d) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), 2(6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By implementing changes in the health insurance plan and the 401(k) plan for unit employees, and by failing to grant those employees a contractual wage increase, without first

providing notices as required by Section 8(d) of the Act, Respondent violated Section 8(a)(5) and (1) of the Act.

4. By conditioning the processing of grievances at step 4 of the parties' grievance-arbitration procedure on the withdrawal of a charge that the Union had filed with the Board, Respondent violated Section 8(a)(5) and (1) of the Act.

5. By interrogating employees and an applicant for employment concerning their union activities and sympathies, Respondent violated Section 8(a)(1) of the Act.

6. By threatening employees with discharge if they refused to cross a picket line, Respondent violated Section 8(a)(1) of the Act.

7. By threatening an employee that it would close its facility in the event of a strike, Respondent violated Section 8(a)(1) of the Act.

7. The following employees of Respondent constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and all part-time employees employed at its New Ulm, Minnesota facility, as licensed practical nurses, graduate practical nurse, registered nurse assistants, physical therapy aides, TMA's, cooks, and employees in the dietary, activities, housekeeping, laundry, bedmaking and maintenance areas, and personal care attendants in the assisted living unit; excluding office clerical employees, guards, supervisors as defined in the Act, and all other employees.

8. The aforesaid unfair labor practices affect commerce within the of Section 2(6) and (7) of the Act.

## Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I have concluded that Respondent violated the Act by implementing changes in the health insurance plan and 401(k) plan for unit employees, and by failing to grant those employees a contractual wage increase. I shall order Respondent, to rescind those changes and restore the health insurance plan and 401(k) plans as they were before the unlawful changes, and I shall order Respondent to grant unit employees the wage increase they were due under the contract between Respondent and the Union. I shall further order that Respondent make unit employees whole for any loss of earnings and benefits suffered as a result of the unlawful changes in the manner provided in *Merryweather Optical Co.,* 240 NLRB 1213 (1979); *Ogle Protection Service,* 183 NLRB 682 (1970), and *Florida Steel Corp.,* 231 NLRB 651 (1977). I have also concluded that Respondent violated the Act by refusing to process grievances at step 4 of the grievance procedure. I shall order Respondent, on request of the Union, to resume processing grievances through step 4 of the grievance procedure without conditioning such processing on the withdrawal of a charge.

On these findings of fact and conclusions of law and on the entire record, I issue the

following recommended[9]

ORDER

The Respondent, Oak Hills Living Center, Highland Manor Inc., New Ulm, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implementing changes in the health insurance plan and 401(k) plan for unit employees, or failing to grant those employees contractual wage increases, or otherwise failing to continue in full force and effect all terms and conditions of an existing collective-bargaining agreement, without first providing notices as required by Section 8(d) of the Act.

(b) Conditioning processing of grievances at step 4 of the parties' grievance-arbitration procedure on the withdrawal of a charge filed by the Union .

(c) Interrogating employees or applicants for employment concerning their union activities and sympathies.

(d) Threatening employees with discharge if they refuse to cross a picket line.

(e) Threatening employees that it will close the facility if there is a strike.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the changes made in the health insurance plan and 401(k) plan, restore those plans as they existed before the unlawful changes, grant employees the wage increase that they were due under the collective-bargaining agreement, and make unit employees whole for any loss of earnings or other benefits suffered as a result of the unlawful changes in the manner described in the Remedy section of this decision.

(b) On request of the Union, resume processing grievances through step 4 of the grievance procedure without conditioning such processing on the withdrawal of a charge.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of earnings or other benefits due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in New Ulm, Minnesota, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a Judgment of the United States Court of Appeals, the words

Continued

provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 3, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 3, 1997

William G. Kocol
Administrative Law Judge

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in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT implement changes in the health insurance plan and 401(k) plan for unit employees, and WE WILL NOT fail to grant those employees contractually schedules wage increases without first providing notices as required by Section 8(d) of the Act.

WE WILL NOT condition the processing of grievances at step 4 of the grievance procedure on the withdrawal of charges filed by the Union.

WE WILL NOT coercively interrogate employees or applicants for employment concerning their union activities or sympathies.

WE WILL NOT threaten employees with discharge if they refuse to cross a picket line.

WE WILL NOT threaten employees that we will close the facilty if there is a strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the changes made in the health insurance plan and the 401(k) plan, restore those plans as they existed before the unlawful change, grant employees the wage increase they were due under the collective-bargaining agreement with the TEAMSTERS LOCAL NO.544, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO, and WE WILL make unit employees whole for any loss of earnings or benefits suffered as a result of the unlawful changes.

WE WILL on request of the Union, resume processing grievances through step 4 of the grievance procedure without conditioning such processing on the withdrawal of charges filed by the Union.

OAK HILLS LIVING CENTER, HIGHLAND MANOR, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 110 South 4th Street, Room 316, Minneapolis, Minnesota 55401–2291, Telephone 612–348–1793.